STATE OF MICHIGAN

COURT OF APPEALS

CELINA MUTUAL INSURANCE COMPANY, an Ohio insurance corporation individually and as subrogee of ERNEST E. KUHNS, d/b/a CORROSION CONTROL COMPANY, an individual,

Plaintiff-Appellee,

-v- No. 95658

AETNA LIFE & CASUALTY COMPANY, a foreign insurance corporation,

Defendant-Appellant.
_____/

BEFORE: R.M. Maher, P.J., R.S. Gribbs and L.F. Simmons*, JJ.

PER CURIAM

Defendant appeals by leave from an order of the Grand Traverse Circuit Court denying its motion for summary disposition brought pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief could be granted. We affirm.

On April 10, 1980, Russell Naasko was on the premises of plaintiff's insured, Ernest E. Kuhns, d/b/a Corrosion Control Company, pursuant to a contract entered into by Corrosion Control and Shell Oil Company, to load and deliver pipes belonging to Shell which had been sandblasted by plaintiff's insured. During this loading operation, a boom truck owned by B & L Hotshot, Inc., Naasko's employer, came into contact with a 7,200 volt overhead power line. Naasko, who was holding a guide rope attached to a hook on the boom truck, sustained injury. Thereafter, Naasko brought suit against Consumers Power Company and Corrosion Control. The claim against Corrosion Control was turned over to plaintiff, Corrosion Control's general liability carrier. Plaintiff, in turn, tendered the defense of the claim to defendant, B & L Hotshot's no-fault insurance carrier, who refused to defend. Plaintiff subsequently settled the claim against its insured. It then filed a complaint for declaratory

*Circuit judge, sitting on the Court of Appeals by assignment

relief against defendant seeking a declaration that defendant had wrongfully refused to defend Corrosion Control against a suit brought by Naasko and seeking the recovery of the settlement monies and costs of Corrosion Control's defense. In response to plaintiff's complaint for declaratory relief, defendant filed a motion for summary disposition alleging that plaintiff had failed to state a claim upon which relief could be granted. The trial court disagreed. It found that plaintiff had stated a claim that defendant's no-fault insurance policy potentially would include Corrosion Control as an additional insured under the insurance contract's omnibus bodily injury liability provision.

The sole issue presented for this Court's resolution is whether defendant no-fault insurer, as a matter of law, had a duty to defend Corrosion Control and to pay any damages claimed by Naasko in the underlying suit against Corrosion Control, the owner of the land on which the accident occurred.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings, viewing the facts alleged in the light most favorable to the nonmoving party. Because the motion tests only the legal and not the factual sufficiency of the pleadings, the court must accept all well-pleaded allegations as true as well as any reasonable inferences or conclusions that can be drawn from those well-pleaded allegations. Bielski v Wolverine Ins Co, 379 Mich 280, 283; 150 NW2d 788 (1967); McCallister v Sun Valley Pools, Inc, 100 Mich App 131, 135; 298 NW2d 687 (1980), lv den 411 Mich 950 (1981). The motion is to be decided solely upon the pleadings. It is to be denied unless claims are so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover. Hankins v Elro Corp, 149 Mich App 22, 26; 386 NW2d 163 (1986).

The rule regarding an insurer's duty to defend was elaborated on by this Court in Detroit Edison Co v Michigan Mutual Ins Co, 102 Mich App 136, 141-142; 301 NW2d 832 (1980):

"The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. Dochod v Central Mutual Ins Co, 81 Mich App 63; 264 NW2d 122 (1978). The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. Shepard Marine Construction Co v Maryland Casualty Co, 73 Mich App 62; 250 NW2d 541 (1976). In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. 14 Couch on Insurance 2d, §51:45, p 538."

The insuring clause of defendant's policy provides in pertinent part:

"I. BODILY INJURY LIABILITY COVERAGE PROPERTY DAMAGE LIABILITY COVERAGE

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

bodily injury or
property damage

to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use, including loading and unloading, for the purposes stated as applicable thereto in the declarations, of an owned automobile or of a temporary substitute automobile, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlements of any claim or suit as it deems expedient. . . ."

The policy defines the term "insured" as follows:

"II. PERSONS INSURED

"Each of the following is an insured under this insurance to the extent set forth below:

"(a) the named insured;

* * *

"(c) any other person while using an owned automobile or a temporary substitute automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:

"(1) a lessee or borrower of the automobile, or

"(2) an employee of the named insured or of such lessee or borrower;

"(d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), or (c) above." (Emphasis added).

Plaintiff argues that Naasko was an insured under §(c)(2) and that he was engaged in the loading of an owned automobile, the boom truck. Plaintiff further argues that Corrosion Control, an organization, became an insured under §(d) because plaintiff's liability stems from the "acts or omissions" of an insured under §(c) of Aetna's policy. According to plaintiff, the act which meets this requirement was the act of the insured coming in contact with the power line.

The language used in an omnibus clause of an insurance policy is to be construed broadly to effectuate a strong legislative policy of assuring financial protection for innocent victims of motor vehicle accidents. Reliance Ins Co v Hawkeye Security Ins Co, 155 Mich App 675, 679; 400 NW2d 619 (1986), lv den 428 Mich 853 (1987). The phrase "use . . . of an owned automobile" for purposes of the omnibus clause, is not limited to operating or having the benefit of the automobile, but includes doing something "to or with" an automobile. Michigan Mutual Liability Co v Ohio Casualty Ins Co, 123 Mich App 688, 692; 333 NW2d 327 (1983).

We conclude that Corrosion Control was "using" the boom truck within the meaning of the omnibus clause of defendant's policy when it had B & L Hotshot use the truck to load and transport the pipes from its premises to a location specified by Shell Oil Company pursuant to the contract entered into between Corrosion Control and Shell Oil Company.

We further conclude that Corrosion Control was an "insured" within the meaning of the omnibus clause in defendant's policy. B & L Hotshot, Inc. and the operator of the boom truck are insureds under defendant's policy pursuant to §§(a) and (c), respectively. Pursuant to §(d), an organization that is not a

named insured can become an insured for purposes of the omnibus clause if the organization becomes subject to liability as a result of the acts or omissions of those defined as an insured under §§(a) and (c). In the instant case, Corrosion Control, an organization, has become subject to liability to Naasko as the result of the acts, omissions or both of B & L Hotshot, Inc. and the boom truck operator, insureds under §§(a) and (c). Specifically, Corrosion Control's liability derives from the insureds' parking of the truck too close to the overhead power line and moving of the boom in such a manner as to cause it to come into contact with the power lines.

Finally, we cannot agree with defendant's contention that the exclusionary provisions contained in its policy of insurance frees defendant from its duty to defend. Pertinent to this issue are the following provision of defendant's policy:

"This insurance does not apply:

* * *

"(b) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

"(c) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to any such injury arising out of and in the course of domestic employment by the insured unless benefits thereof are in whole or in part either payable or required to be provided under any workmen's compensation law."

The obvious purpose of the employee exclusion is to make clear that the automobile liability policy does not provide coverage for claims arising under worker's compensation laws. Michigan Mutual, supra, 696-697. On the facts pled and argued, it is clear that Naasko was not an employee of Corrosion Control, the insured under subsection (d). Furthermore, the employee exclusion does not bar coverage because the claim asserted by Naasko against Corrosion Control sounds in premises liability and does not arise under worker's compensation laws.

Accordingly, we find that plaintiff did plead a cause of action upon which relief can be granted. The trial court did not err in denying defendant's motion. Affirmed.

/s/ Richard M. Maher
/s/ Roman S. Gribbs
/s/ Louis F. Simmons, Jr.